This sample document is derived from a sample document (the "NVCA sample document") that was the work product of a coalition of attorneys who specialize in venture capital financings working under the auspices of the National Venture Capital Association (the "NVCA"). See the NVCA website at nvca.org for a list of the Working Group members. The NVCA sample document has been modified by the Corporations Committee of the Business Law Section of the State Bar of California for use by California corporations. The members of the Corporations Committee who had primary responsibility for modifying the NVCA sample documents for use by California corporations are Lemoine Skinner III, Bruce R. Deming, Matthew R. Gemello, Steven R. Harmon, Mark T. Hiraide, William Sawyers, David M. Serepca, James Thompson, and Bertha Willner. Robert Brigham of the NVCA Working Group reviewed these modifications. This document is intended to serve as a starting point only, and should be tailored to meet your specific requirements. This document should not be construed as legal advice for any particular facts or circumstances. Note that this sample presents an array of (often mutually exclusive) options with respect to particular deal provisions. This sample document is based on the NVCA document whose date is set forth in the footer and does not reflect changes in that document.

MODEL INDEMNIFICATION AGREEMENT

INTRODUCTION

This agreement (the "Agreement") can be used for both officers and directors of the corporation. In some cases, a director will serve as a nominee of one or a group of investors (e.g., an individual venture capitalist serving as a nominee of a venture capital fund). Some investors request that they also be covered by an indemnification agreement. Since the indemnification rights provided by this Agreement cover liability arising by virtue of "corporate status", this Agreement would only work to indemnify investors in a case where the investor is acting as an agent of the corporation. To the extent investors seek indemnification for actions other than those taken in an agency capacity, the circumstances and indemnity provided would be more appropriately covered in the Stock Purchase Agreement.

Section 317 ("Section 317") of the California Corporations Code (the "Corporations Code") is the statutory authority for indemnification of "agents" of the corporation. Section 317(a) defines the term "agent" (as well as "proceeding" and "expenses") for purposes of Section 317. "Agents" include any person who is or was a director, officer, employee or other agent of the corporation." "Other agents" may include a corporation's outside counsel or accounting firm, but see APSB Bancorp v. Thornton Grant, 26 Cal. App. 4th 926 (1994); Channel Lumber Co. v. Simon, 78 Cal. App. 4th 1222 (2000) (cases concluding that independent accounting firm and outside counsel were not "agents" for Section 317 purposes). Section 317(b) permits (but does not require) indemnification of expenses (including attorneys' fees) as well as judgments and amounts paid in settlement in third-party actions (i.e., actions not brought by or in the right of the corporation) if the applicable standard is met. Section 317(c) permits (but does not require) indemnification of expenses (including attorneys' fees) but not judgments and amounts paid in settlement in derivative actions (i.e., actions brought by or in the right of the corporation) if the applicable standard is met. Thus, Section 317 draws a basic distinction between third-party and derivative actions. Section 317(d) requires indemnification of expenses (including attorneys' fees) if the indemnitee is successful on the merits in a proceeding referred to in Section 317(b) or (c). Section 317(e) sets forth requirements for determining whether indemnification is permitted under Section 317(b) or (c). Section 317(f) permits advancement of expenses before final disposition of a proceeding subject to certain conditions. Section 317(g) provides that the statutory rights and procedures regarding indemnification are not exclusive, thus permitting indemnification under bylaws, agreements and other circumstances beyond the limits specified in Section 317, but only if a provision authorized by Corporations Code section 204(a)(11) is included in the corporation's articles of incorporation. (Corporations Code section 204(a)(11) allows inclusion of a provision in the articles of incorporation authorizing (by bylaw, agreement or otherwise) indemnification of agents in excess of that expressly permitted by Section 317 for breach of duty to the corporation and its shareholders. However, excess indemnification under Corporations Code section 204(a)(11) is not allowed (i) for acts, omissions or transactions from which a director may not be relieved from liability by an articles provision included under Corporations Code section 204(a)(10) (see below) or (ii) as to circumstances in which Section 317 expressly prohibits indemnification.) Section 317(g) also provides for the survivorship of rights to indemnification upon ceasing to be a director, officer, employee or agent. Section 317(i) allows a corporation to obtain directors' and officers' liability insurance ("D&O insurance"). Section 317(j) allows a corporation to provide indemnification of trustees, investment managers and other fiduciaries of a corporation's employee benefit plans to the extent permitted by Corporations Code section 207(f).

A "close corporation" (as defined in Corporations Code section 158) may be able to expand indemnification rights beyond what Section 317(g) permits through a provision in a "shareholders' agreement" (as defined in Corporations Code section 186), since Corporations Code section 300(c)—which specifies which Corporations Code provisions can, and cannot, be altered or waived by such an agreement—does not prohibit doing so.

Other relevant statutory authority relating to the protection of directors from monetary liability is set forth in Corporations Code sections 204(a)(10) and 204.5. Corporations Code section 204(a)(10) allows inclusion of a provision in the articles of incorporation that eliminates or limits (i.e., caps) the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of the director's duties to the corporation or its shareholders. (In the case of a close corporation, Corporations Code section 300(b) allows a provision like that authorized by Corporations Code section 204(a)(10) to be included in a shareholders' agreement.) Corporations Code section 204(a)(10), however, prohibits limitations on director liability (i) for acts or omissions that involve intentional misconduct or a knowing and culpable violation of law, (ii) for acts or omissions that a director believes to be contrary to the best interests of the corporation or its shareholders or that involve the absence of good faith on the part of the director, (iii) for any transaction from which a director derives an improper personal benefit, (iv) for acts or omissions that show a reckless disregard for the director's duty to the corporation or its shareholders in circumstances in which the director was aware, or should have been aware, in the ordinary course of performing a director's duties, of a risk of serious injury to the corporation or its shareholders, (v) for acts or omissions that constitute an unexcused pattern of inattention that amounts to an abdication of the director's duty to the corporation or its shareholders, (vi) under Corporations Code section 310 (relating to disclosure of material facts in "interested party" transactions), or (vii) under Corporations Code section 316 (providing for director liability for improper distributions, loans or guaranties). In essence, Corporations Code section 204(a)(10) allows a corporation to protect its directors from monetary liability for duty of care violations. However, Corporations Code section 204(a)(10)(C) expressly states that no such provision shall insulate an officer from liability for acts or omissions as an officer, even if the officer is also a director or his or her actions, if negligent or improper, were ratified by the directors. Corporations Code section 204.5 provides non-exclusive "safe harbor" language for use in a corporation's articles of incorporation to implement Corporations Code section 204(a)(10).

As noted above, Section 317(g) provides that statutory indemnification rights are not exclusive of indemnification rights that may be provided by a bylaw provision, agreement or otherwise. As discussed below, although Section 317(g) could be read broadly to allow a corporation to grant by contract indemnification rights beyond those permitted by Section 317, cases and commentators suggest that contractual indemnification rights may be held unenforceable if they violate other statutes (including Section 317), court decisions or public policy. As a result, the enforceability of contracts that purport to grant indemnification rights beyond those permitted by Section 317 is at best unclear. (For further discussion, see comment under Section 2 of the Agreement below.)

An indemnification agreement may serve several purposes. First, and most importantly, it may provide more secure protection than a provision in articles of incorporation or bylaw because it cannot be amended without the approval of the indemnitee. Second, it can be used to make mandatory indemnification that is permissive under Section 317, to specify various procedures and presumptions that make indemnification more favorable to the indemnitee than is provided

by Section 317 and to perhaps provide for indemnification rights that go beyond those that are expressly provided by Section 317. While such provisions could also be included in the articles of incorporation or bylaws, an agreement permits different rights to be granted to specific directors, officers, employees and agents, rather than in a one-size-fits-all approach.

Some companies choose to provide mandatory indemnification for directors (i.e., the company is required to indemnify a director if the applicable conditions are met) and discretionary indemnification for officers (i.e., indemnification is at the discretion of the company even if the applicable conditions are met). With respect to indemnification of directors, as discussed in the comment under Section 6(b) of the Agreement, there may be no disinterested directors to consider approval of discretionary indemnification for directors. Accordingly, absent mandatory indemnification, a board decision to indemnify itself may not be subject to court deference under the business judgment rule. With respect to indemnification of officers, there may be situations (e.g., termination of employment, sexual harassment) where mandatory indemnification of officers would expose the Company to the possibility of funding the defense of litigation either brought by the Company or in which the Company wants to distance itself from the activities of the officer in question. Care should be taken to anticipate such situations.

Section 317(i) specifically authorizes a corporation to obtain D&O insurance for directors and officers for liability asserted against them in such capacity or arising out of such status <u>whether or not</u> the corporation has the power to indemnify such persons against such liability under Section 317.

D&O insurance coverage is important for several reasons. First, even though indemnification may be <u>permitted</u> under Section 317, the corporation may be <u>unwilling or unable</u> to indemnify the individual. The former situation may arise after a change in corporate control where the corporation is <u>unwilling</u> to indemnify the individual. This may be the case, for example, if the director is the subject of litigation resulting from efforts to prevent the change in control. Alternatively, a corporation may be <u>unable</u> to provide indemnification because it is insolvent. Under Chapter 11 of the federal Bankruptcy Code, for example, indemnification claims by directors or officers would generally be treated as unsecured claims payable only to the extent that other unsecured claims are payable as part of an approved plan of reorganization.

Second, D&O insurance may insure against liabilities where indemnification is not allowed under Section 317. This occurs most frequently in the context of derivative actions and securities law actions. In particular, Section 317(i) permits a corporation to obtain insurance for (i) judgments or amounts paid in settlement in derivative actions and (ii) for expenses incurred when a director has been adjudged liable in some respects, even though indemnification under such circumstances would not be allowed under Section 317(c). In addition, a D&O insurance policy may insure against liabilities under the Securities Act of 1933, as amended (the "1933 Act") and the Securities Exchange Act of 1934, as amended (the "1934 Act"), even though the Securities and Exchange Commission ("SEC") has taken the position that indemnification for liabilities under Section 11 of the 1933 Act are against public policy and courts have held that indemnification for violations of the 1933 and the 1934 Act is contrary to public policy in certain circumstances. (See comment under Section 1(a) of the Agreement.) As a result, D&O insurance may be particularly important for publicly held companies where there is greater risk of liability for derivative actions and securities law claims.

However, D&O insurance policies generally contain a number of qualifications and limitations that narrow the scope of coverage. In particular, D&O insurance coverage is limited by applicable insurance law as well as public policy considerations. In addition, D&O insurance polices generally exclude certain conduct from coverage, including short-swing profit liability under Section 16(b) of the 1934 Act, unauthorized remuneration, personal profit to which the insured individual is not legally entitled, claims arising out of contests for corporate control and claims brought by corporations against their own directors and officers.

INDEMNIFICATION AGREEMENT

THIS INDEMNIFICATION AGREEMENT (the "**Agreement**") is made and entered into as of [_____], 200[_] between **[CORPORATION]**, a California corporation (the "**Company**"), and [name] ("**Indemnitee**").

WITNESSETH THAT:

WHEREAS, highly competent persons have become more reluctant to serve corporations as [directors] [officers] or in other capacities unless they are provided with adequate protection through insurance or adequate indemnification against inordinate risks of claims and actions against them arising out of their service to and activities on behalf of the corporation;

WHEREAS, the Board of Directors of the Company (the "**Board**") has determined that, in order to attract and retain qualified individuals, the Company will attempt to maintain on an ongoing basis, at its sole expense, liability insurance to protect persons serving the Company and its subsidiaries from certain liabilities. Although the furnishing of such insurance has been a customary and widespread practice among United States-based corporations and other business enterprises, the Company believes that, given current market conditions and trends, such insurance may be available to it in the future only at higher premiums and with more exclusions. At the same time, directors, officers, and other persons in service to corporations or business enterprises are being increasingly subjected to expensive and time-consuming litigation relating to, among other things, matters that traditionally would have been brought only against the Company or business enterprise itself. [The Bylaws of the Company require indemnification of the officers and directors of the Company.] Indemnitee may also be entitled to indemnification pursuant to the General Corporation Law of the State of California ("**CGCL**"). The Bylaws and the CGCL expressly provide that the indemnification provisions set forth therein are not exclusive, and thereby contemplate that contracts may be entered into between the Company and members of the board of directors, officers and other persons with respect to indemnification;

WHEREAS, the uncertainties relating to such insurance and to indemnification have increased the difficulty of attracting and retaining such persons;

WHEREAS, the Board has determined that the increased difficulty in attracting and retaining such persons is detrimental to the best interests of the Company's shareholders and that the Company should act to assure such persons that there will be increased certainty of such protection in the future;

WHEREAS, it is reasonable, prudent and necessary for the Company contractually to obligate itself to indemnify, and to advance expenses on behalf of, such persons to the fullest extent permitted by applicable law so that they will serve or continue to serve the Company free from undue concern that they will not be so indemnified;

WHEREAS, this Agreement is a supplement to and in furtherance of the Bylaws of the Company and any resolutions adopted pursuant thereto, and shall not be deemed a substitute therefor, nor to diminish or abrogate any rights of Indemnitee thereunder; and

WHEREAS, Indemnitee does not regard the protection available under the Company's

Bylaws and insurance as adequate in the present circumstances, and may not be willing to serve as an officer or director without adequate protection, and the Company desires Indemnitee to serve in such capacity. Indemnitee is willing to serve, continue to serve and to take on additional service for or on behalf of the Company on the condition that he be so indemnified;

NOW, THEREFORE, in consideration of Indemnitee's agreement to serve as an [officer] [director] after the date hereof, the parties hereto agree as follows:

1. Indemnity of Indemnitee. The Company hereby agrees to hold harmless and indemnify Indemnitee to the fullest extent permitted by law, as such may be amended from time to time. In furtherance of the foregoing indemnification, and without limiting the generality thereof:

[Comment: Sections 1 and 2 of the Agreement contain the basic indemnification obligations of the Agreement. Section 1 provides for indemnification that essentially tracks Section 317, while Section 2 provides for broader indemnification (e.g., by providing for indemnification of judgments, penalties and amounts paid in settlement of derivative actions). The overlap in coverage of Sections 1 and 2 is intentional. Indemnification under Section 1 is designed to be available even if a California court does not allow indemnification under Section 2 in a particular instance.

Section 1 essentially requires indemnification to the fullest extent permitted or required under Section 317. Thus, Section 1 makes mandatory indemnification that is permissive under Sections 317(b) and (c). Note that Section 1 does not make mandatory a determination under Section 317(e) that the applicable standard of conduct has been satisfied. Therefore, even though mandatory, indemnification under Sections 1(a) and (b) is subject to a determination under Section 317(e) and Section 6(b) of the Agreement that the applicable standard has been satisfied.]

(a) Proceedings Other Than Proceedings by or in the Right of the Company. Indemnitee shall be entitled to the rights of indemnification provided in this Section l(a) if, by reason of his Corporate Status (as hereinafter defined), the Indemnitee is, or is threatened to be made, a party to or participant in any Proceeding (as hereinafter defined) other than a Proceeding by or in the right of the Company. Pursuant to this Section 1(a), Indemnitee shall be indemnified against all Expenses (as hereinafter defined), judgments, penalties, fines and amounts paid in settlement actually and reasonably incurred by him, or on his behalf, in connection with such Proceeding or any claim, issue or matter therein, if the Indemnitee acted in good faith and in a manner the Indemnitee reasonably believed to be in the best interests of the Company, and with respect to any criminal Proceeding, had no reasonable cause to believe the Indemnitee's conduct was unlawful.

[Comment: Section 317(b) permits indemnification of officers, directors, employees or agents for attorneys' fees and other expenses as well as for judgments or amounts paid in settlement in civil cases. As noted above, Section 317(b) applies only to third-party actions and not to derivative actions. The person seeking indemnification must have acted in good faith and in a manner reasonably believed to be in the best interests of the corporation in

connection with the claim made against such person. In criminal cases, the indemnitee may be indemnified for fines and costs provided that, in addition to the foregoing standard of conduct, the indemnitee must not have had reasonable cause to believe that indemnitee's conduct was unlawful. Section 1(a) of the Agreement essentially tracks Section 317(b), except that it makes indemnification mandatory rather than permissive.

In contrast to Section 317(b), the Delaware General Corporation Law ("DGCL") provides, in DGCL section 145(a), that indemnification is permitted if the indemnitee's actions were reasonably believed to be in or not opposed to the best interests of the corporation" (emphasis added). Consequently, indemnification for acts that may be taken solely for personal benefit may be available under the DGCL, so long as the indemnitee reasonably did not expect any harm to the corporation, but would not be available under Section 317(b). See Plate v. Sun-Diamond Growers, 225 Cal. App. 3d 1115 (1990).

The distinction between third-party and derivative actions is critical to understanding the statutory framework. A derivative action is an action brought by a shareholder on behalf of the corporation to redress a wrong done by someone to the corporation. Therefore, the derivative action must be based upon an alleged injury to the corporation which caused harm to the corporation itself, and to the shareholders only derivatively through their ownership of stock in the corporation. In some cases, there can be uncertainty as to whether a particular action constitutes a derivative action (i.e., to address a breach of a duty to the corporation) or a third-party action (i.e., a direct harm to the third party plaintiff).

Proceedings that allege breach of fiduciary duties of officers and directors to the corporation often are derivative actions, and actions against officers and directors for violations of federal securities laws (e.g., actions alleging a violation of Section 11 of the 1933 Act in connection with a public offering of securities or Rule 10b-5 in connection with an offer or sale of securities) would normally be third-party actions. Therefore, absent public policy concerns, an action against a director or officer alleging federal securities law liability would fall within the relatively favorable third-party indemnification provisions of Section 317(b). As noted above, Section 317(b) permits indemnity even if the director or officer loses the case, so long as the indemnitee meets the applicable standard following a determination pursuant to Section 317(e).

The SEC has taken the position, however, that even if a director or officer meets the relevant standard of conduct for indemnification under corporate law, corporate indemnification for liabilities arising under the 1933 Act is against public policy. In addition, courts have held that indemnification for violations of either the 1933 Act or the 1934 Act is contrary to public policy, at least for violations based upon culpable behavior greater than ordinary negligence.

These public policy limitations may apply to a variety of sources of liability under the 1933 Act and 1934 Act, including (i) Section 12 of the 1933 Act for offers and sales of securities, (ii) Rule 10b-5 of the 1934 Act for violation of antifraud

provisions, (iii) Section 16(b) of the 1934 Act for short–swing trading profits, (iv) Section 15 of the 1933 Act and Section 20 of the 1934 Act for liability of control persons and Section 18 of the 1934 Act for misleading statements. Thus, even though otherwise permissible under Section 317(b), indemnification may be contrary to the public policy underlying the federal securities laws and therefore unenforceable. These potential limitations on indemnity underscore the importance of having separate D&O insurance coverage.]

(b) Proceedings by or in the Right of the Company. Indemnitee shall be entitled to the rights of indemnification provided in this Section 1(b) if, by reason of his Corporate Status, the Indemnitee is, or is threatened to be made, a party to or participant in any Proceeding brought by or in the right of the Company. Pursuant to this Section 1(b), Indemnitee shall be indemnified against all Expenses actually and reasonably incurred by the Indemnitee, or on the Indemnitee's behalf, in connection with such Proceeding if the Indemnitee acted in good faith and in a manner the Indemnitee believed to be in the best interests of the Company and its shareholders; provided, however, if applicable law so provides, (i) no indemnification against such Expenses shall be made in respect of any claim, issue or matter in such Proceeding as to which Indemnitee shall have been adjudged to be liable to the Company in the performance of Indemnitee's duty to the Company and its shareholders unless and to the extent that the court in which the Proceeding is or was pending shall determine that such indemnification may be made, (ii) no indemnification shall be made against amounts paid in settling or otherwise disposing of a pending Proceeding without court approval, and (iii) no indemnification shall be made against expenses incurred in defending a pending Proceeding which is settled or otherwise disposed of without court approval.

[Comment: Section 317(c) permits indemnification of directors, officers, employees and agents for attorneys' fees and other expenses in derivative actions but not for judgments, fines or amounts paid in settlement of such actions, and not for expenses incurred in a matter settled without court approval. However, in a proceeding where the individual is adjudged to be liable to the corporation, Section 317(c) does not permit indemnification even for expenses unless and to the extent that an appropriate court determines that, in view of all the circumstances, the individual is fairly and reasonably entitled to indemnification for such expenses. Thus, indemnification for derivative actions is significantly more limited than for third-party actions. The rationale for this distinction is that any liability in a derivative action is to make the corporation (on whose behalf the action was brought) whole for harm it suffered, and the corporation would not receive any benefit by indemnifying an individual against such liability. In effect, the corporation would be returning funds to the person liable to pay them. As with Section 1(a) of the Agreement, Section 1(b) of the Agreement essentially tracks Section 317(c), except that it makes indemnification mandatory rather than permissible.

Note that, by allowing the articles of incorporation to eliminate or limit a director's exposure to financial liability for breaches of certain classes of fiduciary duties, Corporations Code section 204(a)(10) may reduce exposure for claims that would otherwise result in derivative actions and thereby overcome some of the limitations on indemnification in Section 317(c).]

(c) Indemnification for Expenses of a Party Who is Wholly or Partly Successful. Notwithstanding any other provision of this Agreement, to the extent that Indemnitee is, by reason of his Corporate Status, a party to and is successful, on the merits, in any Proceeding, he shall be indemnified to the maximum extent permitted by law, as such may be amended from time to time, against all Expenses actually and reasonably incurred by him or on his behalf in connection therewith. If Indemnitee is not wholly successful in such Proceeding but is successful, on the merits, as to one or more but less than all claims, issues or matters in such Proceeding, the Company shall indemnify Indemnitee against all Expenses actually and reasonably incurred by him or on his behalf in connection with each claim, issue or matter as to which Indemnitee is successful, on the merits. For purposes of this Section and without limitation, the termination of any claim, issue or matter in such a Proceeding by dismissal with prejudice shall be deemed to be a successful result as to such claim, issue or matter.

[Comment: Section 317(d) requires the corporation to indemnify a director or officer for attorneys' fees and other expenses actually and reasonably incurred in connection with a proceeding referred to in Sections 317(b) or (c) to the extent that the indemnitee is "successful on the merits." This contrasts with DGCL section 145(c), which provides for mandatory indemnification where the indemnitee is "successful on the merits or otherwise." (emphasis added.) In other words, under the Corporations Code, an indemnitee is not automatically entitled to indemnification for reasonable expenses if the indemnitee is successful for "technical" (procedural) reasons, rather than "on the merits" (substantive), but under the DGCL, an indemnitee that prevails for substantive or procedural reasons would be automatically entitled to indemnification. Based on this distinction, a California court denied mandatory indemnification under Section 317(d) where a pending action against the prospective indemnitee was voluntarily dismissed, since there had been no adjudication of the indemnitee's defense. See American Nat'l Bank & Trust Co. v. Schigur, 83 Cal. App. 3d 790, 793 (1978). In such a situation, however, the agent may still be eligible for permissive indemnification. California courts have not clearly addressed whether a settlement that terminates a proceeding is considered "success on the merits", although one Court of Appeal found that a "success on the merits" existed and mandatory indemnification was proper under Section 317(d) when sought by a corporate director who had obtained a release barring a cause of action against the director. See Wilshire-Doheny Assocs., Ltd. v. Shapiro, 83 Cal. App. 4th 1380 (2000). Section 1(c) of the Agreement essentially tracks Section 317(d), except that it explicitly addresses the situation where the indemnitee is partially successful by providing that an indemnitee is entitled to indemnification for expenses incurred with respect to successfully resolved claims.]

2. Additional Indemnity. In addition to, and without regard to any limitations on, the indemnification provided for in Section 1 of this Agreement, the Company shall and hereby does indemnify and hold harmless Indemnitee against all Expenses, judgments, penalties, fines and amounts paid in settlement actually and reasonably incurred by him or on his behalf if, by reason of his Corporate Status, he is, or is threatened to be made, a party to or participant in any Proceeding (including a Proceeding by or in the right of the Company), including, without limitation, all liability arising out of the negligence or active or passive wrongdoing of Indemnitee. The only limitation that shall exist upon the Company's obligations

pursuant to this Agreement shall be that the Company shall not be obligated to make any payment to Indemnitee that is finally determined (under the procedures, and subject to the presumptions, set forth in Sections 6 and 7 hereof) to be unlawful.

[Comment: Section 2 of the Agreement provides for additional indemnification beyond the scope of indemnification provided by Section 1 of the Agreement. For example, Section 2 provides for mandatory indemnification of judgments, penalties, fines and amounts paid in settlement of derivative actions. The only limitation is that no indemnification is required to the extent that it is finally determined to be unlawful in accordance with procedures and presumptions set forth in the Agreement. As noted above, indemnification in excess of the limits set by Section 317 requires an express provision in the corporation's articles of incorporation, under Corporations Code section 204(a)(11), and therefore Section 2 cannot be used if the corporation has no such articles provision.

Contractual indemnification rights beyond Section 317 can be classified into different categories that may be helpful in assessing their enforceability. Some contractual rights make indemnification which is permissive under Section 317 mandatory (e.g., a provision requiring indemnification relating to third-party actions to the extent permitted under Section 317(b)). Other contractual rights attempt to clarify or supplement statutory rights without significantly altering those rights (e.g., a procedural requirement that a corporation advance expenses within a certain period of time following a proper undertaking from the indemnitee or defining "independent legal counsel" for purposes of making a determination under Section 317(e)). Still other contractual rights specify policies, procedures and presumptions that have the purpose or effect of enhancing indemnification rights beyond the provisions of Section 317 (e.g., a presumption that an individual has met the applicable standard of care or a provision that a determination that the applicable standard of care is deemed to be met if no such determination is made within a specified period). Finally, some contractual indemnification rights appear to be inconsistent with the limits on indemnification specified in Section 317 (e.g., a provision indemnifying for judgments in derivative actions even if the indemnitee has engaged in clearly culpable behavior).

The scope of additional protection provided by Section 2 of the Agreement is unclear, since the standards for excess indemnification are uncertain under California law. As noted above, although Section 317(g) expressly permits contractual indemnification rights beyond the statutory rights provided for in Section 317, the enforceability of such contractual rights may be limited by statute, court decision and public policy. Delaware case law may provide guidance with respect to the extent of permitted indemnification. In this regard, one commentator on Delaware corporate law has noted: "There is no case which spells out the precise perimeters of the extent to which an indemnification agreement . . . may go in providing indemnification rights . . . under [DGCL] [s]ection 145(f) [Delaware's counterpart provision to Corporations Code section 317(g)] . . . Although there is no case law on point, it is probable that a Delaware court would not allow indemnification under a . . . contract when the proposed indemnification is prohibited by law or public policy. . . . Nevertheless,

[DGCL] [s]ection 145(f) does provide support for wide-ranging agreements which broaden or enlarge upon indemnification rights granted in the various other subsections of [DGCL] [s]ection 145, although provisions in such a[n] . . . agreement which are contrary to limitations or prohibitions set forth in other subsections may be held unenforceable if they violate other statutes, court decisions or public policies. . . . For example, because of the limitations of [DGCL] [s]ection 145(b), a corporation may not be able to indemnify under the authority of [DGCL] [s]ection 145(f) for judgments or amounts paid in settlements in derivative suits. . . . On the other hand, [DGCL] [s]ection 145(f) may authorize the adoption of various procedures and presumptions to make the process of indemnification more favorable to the indemnitee without violating that statute." See Balotti and Finkelstein, Delaware Law of Corporation and Business Organizations, § 4.16 at 4-345 to 4-350.

California law may require indemnification in excess of what is expressly permitted or mandated by Section 317, in certain contexts. For example, California Labor Code section 2802 provides that an employer must indemnify its employee for "all necessary expenditures of losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." Labor Code section 2802 indemnification would normally cover some directors or officers, but not all Section 317 "agents", such as outside directors. Because Section 317 indemnification is not exclusive, so long as a corporation has a provision authorizing additional indemnification under Corporations Code section 204(a)(11), this generally should pose no problem to corporations in most cases. However, it is possible that indemnification required by Labor Code section 2802 might violate public policy or explicit prohibitions in Section 317, a conflict which has not been settled by California courts. See CEB, Organizing Corporations in California, §2.68 at 233. Section 317(g)'s provision that Section 317 does not affect any indemnification right conferred "by contract or otherwise" on persons other than directors and officers might be construed to resolve the conflict in favor of indemnification mandated by Labor Code section 2802.

Sometimes a contract providing for indemnification beyond Section 317 will itself contain limitations on the scope of additional indemnification. These limitations might include prohibitions on indemnification for (i) violations of insider trading laws such as Section 16(b) of the 1934 Act, (ii) conduct that is determined to be knowingly fraudulent or deliberately dishonest or to constitute willful misconduct, (iii) actions brought by the corporation, (iv) actions brought by the indemnitee without board approval and (v) actions relating to proxy contests in opposition to the board. See Section 9 of the Agreement below.]

3. Contribution.

[Comment: The provisions regarding contribution are primarily intended to provide an alternative means of protecting individuals from liability for some types of federal securities law violations where indemnification is unenforceable for public policy reasons. For example, Section 11(f) of the 1933 Act explicitly recognizes contribution in cases where one or more persons are or may be subject to the same liability under Section 11, even though the SEC takes the position that indemnification for Section 11 violations is contrary to public policy.]

(a) Whether or not the indemnification provided in Sections 1 and 2 hereof is available, in respect of any threatened, pending or completed action, suit or proceeding in which the Company is jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding), the Company shall pay, in the first instance, the entire amount of any judgment or settlement of such action, suit or proceeding without requiring Indemnitee to contribute to such payment and the Company hereby waives and relinquishes any right of contribution it may have against Indemnitee. The Company shall not enter into any settlement of any action, suit or proceeding in which the Company is jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding) unless such settlement provides for a full and final release of all claims asserted against Indemnitee.

[Comment: Section 3(a) of the Agreement, in effect, provides that where the corporation and the individual are jointly liable (or if joined, would be), the corporation shall contribute 100% of the liability, and the individual would not be required to contribute anything. Section 3(a) also prohibits the corporation from entering into any settlement that does not completely release the individual.]

(b) Without diminishing or impairing the obligations of the Company set forth in the preceding subparagraph, if, for any reason, Indemnitee shall elect or be required to pay all or any portion of any judgment or settlement in any threatened, pending or completed action, suit or proceeding in which the Company is jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding), the Company shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by Indemnitee in proportion to the relative benefits received by the Company and all officers, directors or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and Indemnitee, on the other hand, from the transaction from which such action, suit or proceeding arose; provided, however, that the proportion determined on the basis of relative benefit may, to the extent necessary to conform to law, be further adjusted by reference to the relative fault of the Company and all officers, directors or employees of the Company other than Indemnitee who are jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and Indemnitee, on the other hand, in connection with the events that resulted in such expenses, judgments, fines or settlement amounts, as well as any other equitable considerations which the Law may require to be considered. The relative fault of the Company and all officers, directors or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such action, suit or proceeding), on the one hand, and Indemnitee, on the other hand, shall be determined by reference to, among other things, the degree to which their actions were motivated

by intent to gain personal profit or advantage, the degree to which their liability is primary or secondary and the degree to which their conduct is active or passive.

[Comment: Section 3(b) of the Agreement provides an alternative method of allocating the amount contributed by the corporation and the individual in the event that the method of allocation in Section 3(a) of the Agreement (i.e., 100% payment by the corporation) is not enforceable. In particular, Section 3(b) provides for allocation based on the relative benefits received from the transaction giving rise to liability, and if required to conform to law, the relative fault of the parties.]

(c) The Company hereby agrees to fully indemnify and hold Indemnitee harmless from any claims of contribution which may be brought by officers, directors or employees of the Company, other than Indemnitee, who may be jointly liable with Indemnitee.

[Comment: Section 3(c) of the Agreement attempts to indemnify the indemnitee against contribution sought from other third parties.]

(d) To the fullest extent permissible under applicable law, if the indemnification provided for in this Agreement is unavailable to Indemnitee for any reason whatsoever, the Company, in lieu of indemnifying Indemnitee, shall contribute to the amount incurred by Indemnitee, whether for judgments, fines, penalties, excise taxes, amounts paid or to be paid in settlement and/or for Expenses, in connection with any claim relating to an indemnifiable event under this Agreement, in such proportion as is deemed fair and reasonable in light of all of the circumstances of such Proceeding in order to reflect (i) the relative benefits received by the Company and Indemnitee as a result of the event(s) and/or transaction(s) giving cause to such Proceeding; and/or (ii) the relative fault of the Company (and its directors, officers, employees and agents) and Indemnitee in connection with such event(s) and/or transaction(s).

[Comment: Section 3(d) of the Agreement provides for contribution by the Company even if the Company is not held jointly liable based on the relative benefit to the Company of the conduct of the indemnitee giving rise to the loss or expenses incurred by the indemnitee and/or the relative fault of the Company and the indemnitee in connection with the matter in question.]

4. Indemnification for Expenses of a Witness. Notwithstanding any other provision of this Agreement, to the extent that Indemnitee is, by reason of his Corporate Status, a witness in any Proceeding to which Indemnitee is not a party, he shall be indemnified against all Expenses actually and reasonably incurred by him or on his behalf in connection therewith.

[Comment: Section 4 of the Agreement indemnifies individuals for costs and expenses in serving as a witness in any proceeding relating to such person's service to the corporation.]

5. Advancement of Expenses. Notwithstanding any other provision of this Agreement, the Company shall advance all Expenses incurred by or on behalf of Indemnitee in connection with any Proceeding by reason of Indemnitee's Corporate Status within thirty (30) days after the receipt by the Company of a statement or statements from Indemnitee requesting

such advance or advances from time to time, whether prior to or after final disposition of such Proceeding. Such statement or statements shall reasonably evidence the Expenses incurred by Indemnitee and shall include or be preceded or accompanied by an undertaking by or on behalf of Indemnitee to repay any Expenses advanced if it shall ultimately be determined that Indemnitee is not entitled to be indemnified against such Expenses. Any advances and undertakings to repay pursuant to this Section 5 shall be unsecured and interest free.

[Comment: As noted above, Section 317(f) provides for the advancement of attorneys' fees and other expenses to officers and directors in connection with any proceeding. Section 317(f) conditions any advance upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it is ultimately determined that such individual is not entitled to be indemnified pursuant to Section 317.

Section 5 of the Agreement is modeled after Section 317(f), except that it makes the corporation's duty to advance expenses mandatory rather than permissive. Section 5 also supplements Section 317(f) in various respects. Section 5 requires payment within 30 days after receipt of a request for advancement (provided the request includes a statement of the expenses and an undertaking to repay any advance expenses if it is determined that the indemnitee is not entitled to indemnification against such expenses).

6. Procedures and Presumptions for Determination of Entitlement to Indemnification. It is the intent of this Agreement to secure for Indemnitee rights of indemnity that are as favorable as may be permitted under the CGCL and public policy of the State of California. Accordingly, the parties agree that the following procedures and presumptions shall apply in the event of any question as to whether Indemnitee is entitled to indemnification under this Agreement:

[Comment: Section 6 of the Agreement specifies policies and procedures to be applied in determining whether an individual is entitled to indemnification under the Agreement. As with other provisions of the Agreement, these policies and procedures are not specifically authorized by Section 317. As a result, the rights and procedures specified in Section 6 may be unenforceable. See the comment under Section 2 of the Agreement above. Note, however, that unlike indemnification agreements customarily entered into in financings (e.g., between the issuer and underwriters in an underwritten public offering), this Agreement (like most indemnification agreements) does not delineate defense procedures.]

(a) To obtain indemnification under this Agreement, Indemnitee shall submit to the Company a written request, including therein or therewith such documentation and information as is reasonably available to Indemnitee and is reasonably necessary to determine whether and to what extent Indemnitee is entitled to indemnification. The Secretary of the Company shall, promptly upon receipt of such a request for indemnification, advise the Board of Directors in writing that Indemnitee has requested indemnification.

(b) Upon written request by Indemnitee for indemnification pursuant to the first sentence of Section 6(a) hereof, a determination, if required by applicable law, with respect to Indemnitee's entitlement thereto shall be made in the specific case by one of the

following four methods, which shall be at the election of the board: (1) by a majority vote of a quorum of Disinterested Directors, (2) if such a quorum of directors is not obtainable, by independent legal counsel in a written opinion to the Board of Directors, a copy of which shall be delivered to the Indemnitee, (3) if so directed by the Board of Directors, by approval of the shareholders of the Company (as defined in section 153 of the CGCL), with the shares owned by the Indemnitee not being entitled to vote thereon, or (4) by the court in which the Proceeding is or was pending.

[Comment: As noted above, Section 317(e) provides that indemnification under Sections 317(b) and (c) must be authorized on a case-by-case basis in accordance with a statutorily mandated decision making process. The determination that must be made in each case is whether indemnification is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth Section 317(b) or (c). Such determination may be made (i) by a majority vote of a quorum of directors who are not parties to the proceeding, (ii) by independent legal counsel in a written opinion, (iii) by the vote of shareholders (with the indemnitee's shares not being entitled to vote), or (iv) by the court in which the proceeding is or was pending.

There are a number of practical problems in making a determination pursuant to Section 317(e). First, many actions that give rise to indemnification claims will be brought against <u>all</u> directors and therefore preclude a determination by majority vote of a quorum consisting of disinterested directors. One solution might be to appoint additional disinterested directors to make a determination, although this course of action may present its own difficulties. Second, many corporations and directors will be reluctant to use the alternative of seeking shareholder approval, particularly for publicly held corporations where the approval process would be difficult and widely publicized. Third, the term "independent legal counsel" is not defined in Section 317 or applicable case law, and even if a well-established definition existed, a number of issues would arise in rendering a required opinion should experienced counsel agree to consider doing so.

Section 6(b) of the Agreement allows the board to select the method of determination. Some agreements for public companies provide that independent counsel make the determination following a change in control (presumably on the theory that directors and shareholders after a change in control may be less inclined to act impartially) and allow the company to select the method of determination otherwise. Other agreements purport to vest this authority in the Indemnitee, but such a provision could be challenged as an unlawful delegation of the board's responsibility to manage the business and affairs of the corporation under Corporations Code section 300(a).

Section 317(e) does not expressly permit a corporation to assign a determination of eligibility for indemnification to a committee of the board. Contrast DGCL section 145(d), which provides that permissive indemnification must be approved by (1) by a majority vote of the disinterested directors, even though less than a quorum, (2) by a committee of disinterested directors designated by a majority vote of the disinterested directors, even though less than a quorum, (3) if there are

no disinterested directors or if the disinterested directors so direct, by independent legal counsel, or (4) by the stockholders of the corporation. California corporations that wish to follow Delaware's approach and allow this determination by a committee should consider the following: (1) it is not clear whether the Corporations Code provision authorizing the board to designate committees to act with the authority of the board (Corporations Code section 311) permits a board committee to have authority to make a determination of eligibility for indemnification, and (2) where pursuant to Corporations Code section 204(a)(11), the articles of incorporation of a California corporation permit indemnification in excess of that expressly permitted by Corporations Code section 317, it may be possible for a corporation to adopt the Delaware procedure for approval of indemnification, either in its bylaws or an indemnification agreement.

For a public company where it is desired to provide that following a change of control the indemnification determination would be made by independent counsel, an example of a typical "change of control" definition follows:

> *__.__. A "Change in Control" shall be deemed to occur upon the earliest to occur after the date of this Agreement of any of the following events:*
>
> *(i) Acquisition of Stock by Third Party. Any Person (as defined below) is or becomes the Beneficial Owner (as defined below), directly or indirectly, of securities of the Company representing [fifteen percent (15%)] or more of the combined voting power of the Company's then outstanding securities;*
>
> *(ii) Change in Board of Directors. During any period of two (2) consecutive years (not including any period prior to the execution of this Agreement), individuals who at the beginning of such period constitute the Board, and any new director (other than a director designated by a person who has entered into an agreement with the Company to effect a transaction described in Sections __(a)(i), __(a)(iii) or __(a)(iv)) whose election by the Board or nomination for election by the Company's shareholders was approved by a vote of at least two-thirds of the directors then still in office who either were directors at the beginning of the period or whose election or nomination for election was previously so approved, cease for any reason to constitute a least a majority of the members of the Board;*
>
> *(iii) Corporate Transactions. The effective date of a merger or consolidation of the Company with any other entity, other than a merger or consolidation which would result in the voting securities of the Company outstanding immediately prior to such merger or consolidation continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving entity) more than 51% of the combined voting*

power of the voting securities of the surviving entity outstanding immediately after such merger or consolidation and with the power to elect at least a majority of the board of directors or other governing body of such surviving entity;

(iv) Liquidation. The approval by the shareholders of the Company of a complete liquidation of the Company or an agreement for the sale or disposition by the Company of all or substantially all of the Company's assets; and

(v) Other Events. There occurs any other event of a nature that would be required to be reported in response to Item 6(e) of Schedule 14A of Regulation 14A (or a response to any similar item on any similar schedule or form) promulgated under the Exchange Act (as defined below), whether or not the Company is then subject to such reporting requirement.

For purposes of this Section __(a), the following terms shall have the following meanings:

(A) "Exchange Act" shall mean the Securities Exchange Act of 1934, as amended.

(B) "Person" shall have the meaning as set forth in Sections 13(d) and 14(d) of the Exchange Act; provided, however, that Person shall exclude (i) the Company, (ii) any trustee or other fiduciary holding securities under an employee benefit plan of the Company, and (iii) any corporation owned, directly or indirectly, by the shareholders of the Company in substantially the same proportions as their ownership of stock of the Company.

(C) "Beneficial Owner" shall have the meaning given to such term in Rule 13d-3 under the Exchange Act; provided, however, that Beneficial Owner shall exclude any Person otherwise becoming a Beneficial Owner by reason of the shareholders of the Company approving a merger of the Company with another entity.]

(c) If the determination of entitlement to indemnification is to be made by Independent Counsel pursuant to Section 6(b) hereof, the Independent Counsel shall be selected as provided in this Section 6(c). The Independent Counsel shall be selected by the Board of Directors. Indemnitee may, within 10 days after such written notice of selection shall have been given, deliver to the Company, as the case may be, a written objection to such selection; provided, however, that such objection may be asserted only on the ground that the Independent Counsel so selected does not meet the requirements of "**Independent Counsel**" as defined in Section 13 of this Agreement, and the objection shall set forth with particularity the factual basis of such assertion. Absent a proper and timely objection, the person so selected shall act as Independent Counsel. If a written objection is made and substantiated, the Independent Counsel selected may not serve as Independent Counsel unless and until such objection is

withdrawn or a court has determined that such objection is without merit. If, within 20 days after submission by Indemnitee of a written request for indemnification pursuant to Section 6(a) hereof, no Independent Counsel shall have been selected and not objected to, either the Company or Indemnitee may petition an appropriate court of the State of California for resolution of any objection which shall have been made by the Indemnitee to the Company's selection of Independent Counsel and/or for the appointment as Independent Counsel of a person selected by the court or by such other person as the court shall designate, and the person with respect to whom all objections are so resolved or the person so appointed shall act as Independent Counsel under Section 6(b) hereof. The Company shall pay any and all reasonable fees and expenses of Independent Counsel incurred by such Independent Counsel in connection with acting pursuant to Section 6(b) hereof, and the Company shall pay all reasonable fees and expenses incident to the procedures of this Section 6(c), regardless of the manner in which such Independent Counsel was selected or appointed.

[Comment: Sections 6(c) through (g) of the Agreement specify procedures and presumptions that apply in making a determination of entitlement to indemnification. Section 6(c) gives the Board the right to select independent legal counsel, subject to an objection procedure. Some public company indemnification agreements vest the ability to select the Independent Counsel in the Indemnitee after a change of control; but such a provision could be challenged as an unlawful delegation of the board's responsibility to manage the business and affairs of the corporation under Corporations Code section 300(a). Section 6(d) below creates a presumption that the indemnitee is entitled to indemnification, allocates the burden of proof to the party seeking to overcome the presumption and specifies an applicable standard of proof. Section 6(e), among other things, creates a presumption that the indemnitee acted in accordance with the standard of behavior required for indemnification, allocates the burden of proof to the party seeking to overcome the presumption, specifies the applicable standard of proof and specifies circumstances under which the indemnitee is deemed to have acted in good faith. Section 6(f) below provides for a determination of entitlement if no determination is made by the decision-maker within 60 days after a request for determination (plus a 30 day extension right) subject to certain conditions. Section 6(g) below requires the indemnitee to cooperate with the person or persons making the determination, requires such person or persons to act reasonably and in good faith and requires the corporation to pay certain costs associated with making the determination.]

(d) In making a determination with respect to entitlement to indemnification hereunder, the person or persons or entity making such determination shall presume that Indemnitee is entitled to indemnification under this Agreement. Anyone seeking to overcome this presumption shall have the burden of proof and the burden of persuasion by clear and convincing evidence. Neither the failure of the Company (including by its directors or independent legal counsel) to have made a determination prior to the commencement of any action pursuant to this Agreement that indemnification is proper in the circumstances because Indemnitee has met the applicable standard of conduct, nor an actual determination by the Company (including by its directors or independent legal counsel) that Indemnitee has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that Indemnitee has not met the applicable standard of conduct.

[Comment: Indemnification agreements may be subject to review by state securities law administrators if the corporation's securities are registered or qualified in their state. For example, the California Department of Corporations has objected to shifting the burden of proof as provided in this Section 6(d) of the Agreement. In one instance, a corporation was required to renegotiate indemnification agreements with its directors to eliminate a similar provision before qualifying an issuance of securities in California.]

(e) Indemnitee shall be deemed to have acted in good faith if Indemnitee's action is based on the records or books of account of the Enterprise (as hereinafter defined), including financial statements, or on information supplied to Indemnitee by the officers of the Enterprise in the course of their duties, or on the advice of legal counsel for the Enterprise or on information or records given or reports made to the Enterprise by an independent certified public accountant or by an appraiser or other expert selected with reasonable care by the Enterprise. In addition, the knowledge and/or actions, or failure to act, of any director, officer, agent or employee of the Enterprise shall not be imputed to Indemnitee for purposes of determining the right to indemnification under this Agreement. Whether or not the foregoing provisions of this Section 6(e) are satisfied, it shall in any event be presumed that Indemnitee has at all times acted in good faith and in a manner he reasonably believed to be in the best interests of the Company. Anyone seeking to overcome this presumption shall have the burden of proof and the burden of persuasion by clear and convincing evidence.

(f) If the person, persons or entity empowered or selected under Section 6 to determine whether Indemnitee is entitled to indemnification shall not have made a determination within sixty (60) days after receipt by the Company of the request therefor, the requisite determination of entitlement to indemnification shall be deemed to have been made and Indemnitee shall be entitled to such indemnification absent (i) a misstatement by Indemnitee of a material fact, or an omission of a material fact necessary to make Indemnitee's statement not materially misleading, in connection with the request for indemnification, or (ii) a prohibition of such indemnification under applicable law; provided, however, that such 60-day period may be extended for a reasonable time, not to exceed an additional thirty (30) days, if the person, persons or entity making such determination with respect to entitlement to indemnification in good faith requires such additional time to obtain or evaluate documentation and/or information relating thereto; and provided, further, that the foregoing provisions of this Section 6(f) shall not apply if the determination of entitlement to indemnification is to be made by the shareholders pursuant to Section 6(b) of this Agreement and if (A) within fifteen (15) days after receipt by the Company of the request for such determination, the Board of Directors resolve to submit such determination to the shareholders for their consideration at an annual meeting thereof to be held within seventy-five (75) days after such receipt and such determination is made thereat, or (B) a special meeting of shareholders is called within fifteen (15) days after such receipt for the purpose of making such determination, such meeting is held for such purpose within sixty (60) days after having been so called and such determination is made thereat.

(g) Indemnitee shall cooperate with the person, persons or entity making such determination with respect to Indemnitee's entitlement to indemnification, including providing to such person, persons or entity upon reasonable advance request any documentation or information which is not privileged or otherwise protected from disclosure and which is reasonably available to Indemnitee and reasonably necessary to such determination. Any Independent Counsel, member of the Board of Directors or shareholder of the Company

shall act reasonably and in good faith in making a determination regarding the Indemnitee's entitlement to indemnification under this Agreement. Any costs or expenses (including attorneys' fees and disbursements) incurred by Indemnitee in so cooperating with the person, persons or entity making such determination shall be borne by the Company (irrespective of the determination as to Indemnitee's entitlement to indemnification) and the Company hereby indemnifies and agrees to hold Indemnitee harmless therefrom.

(h) The Company acknowledges that a settlement or other disposition short of final judgment may be successful if it permits a party to avoid expense, delay, distraction, disruption and uncertainty, and that the legal merits of such party's defense in the proceeding materially contribute to such success. In the event that any action, claim or proceeding to which Indemnitee is a party is resolved in any manner other than by adverse judgment against Indemnitee (including, without limitation, settlement of such action, claim or proceeding with or without payment of money or other consideration), it shall be presumed that Indemnitee has been successful on the merits in such action, suit or proceeding. Anyone seeking to overcome this presumption shall have the burden of proof and the burden of persuasion by clear and convincing evidence.

[Comment: Section 6(h) of the Agreement creates a presumption that any resolution of a claim other than by adverse judgment against the indemnitee (including a settlement, regardless of whether money is paid) constitutes being "successful on the merits" for purposes of Section 317(d). Section 6(h) also allocates the burden of proof to the party seeking to overcome the presumption and specifies the standard of proof in overcoming the presumption. If enforceable, this provision is particularly helpful because it would allow for mandatory indemnification pursuant to Section 317(d).]

(i) The termination of any Proceeding or of any claim, issue or matter therein, by judgment, order, settlement or conviction, or upon a plea of nolo contendere or its equivalent, shall not (except as otherwise expressly provided in this Agreement) of itself adversely affect the right of Indemnitee to indemnification or create a presumption that Indemnitee did not act in good faith and in a manner which he reasonably believed to be in the best interests of the Company or, with respect to any criminal Proceeding, that Indemnitee had reasonable cause to believe that his conduct was unlawful.

7. Remedies of Indemnitee.

(a) In the event that (i) a determination is made pursuant to Section 6 of this Agreement that Indemnitee is not entitled to indemnification under this Agreement, (ii) advancement of Expenses is not timely made pursuant to Section 5 of this Agreement, (iii) no determination of entitlement to indemnification is made pursuant to Section 6(b) of this Agreement within 90 days after receipt by the Company of the request for indemnification, (iv) payment of indemnification is not made pursuant to this Agreement within ten (10) days after receipt by the Company of a written request therefor or (v) payment of indemnification is not made within ten (10) days after a determination has been made that Indemnitee is entitled to indemnification or such determination is deemed to have been made pursuant to Section 6 of this Agreement, Indemnitee shall be entitled to an adjudication in an appropriate court of the State of California, or in any other court of competent jurisdiction, of Indemnitee's entitlement to such indemnification. Indemnitee shall commence such proceeding seeking an adjudication within

180 days following the date on which Indemnitee first has the right to commence such proceeding pursuant to this Section 7(a). The Company shall not oppose Indemnitee's right to seek any such adjudication.

[Comment: Section 7(a) of the Agreement provides for a right of adjudication before a California court in the event of certain adverse results under the Agreement.]

(b) In the event that a determination shall have been made pursuant to Section 6(b) of this Agreement that Indemnitee is not entitled to indemnification, any judicial proceeding commenced pursuant to this Section 7 shall be conducted in all respects as a de novo trial on the merits, and Indemnitee shall not be prejudiced by reason of the adverse determination under Section 6(b).

[Comment: Sections 7(b) through 7(e) of the Agreement seek to extend statutory indemnification rights pursuant to Section 317(g) without running afoul of the limitations in Section 317(h).]

(c) If a determination shall have been made pursuant to Section 6(b) of this Agreement that Indemnitee is entitled to indemnification, the Company shall be bound by such determination in any judicial proceeding commenced pursuant to this Section 7, absent (i) a misstatement by Indemnitee of a material fact, or an omission of a material fact necessary to make Indemnitee's misstatement not materially misleading in connection with the application for indemnification, or (ii) a prohibition of such indemnification under applicable law.

(d) In the event that Indemnitee, pursuant to this Section 7, seeks a judicial adjudication of his rights under, or to recover damages for breach of, this Agreement, or to recover under any directors' and officers' liability insurance policies maintained by the Company, the Company shall pay on his behalf, in advance, any and all expenses (of the types described in the definition of Expenses in Section 13 of this Agreement) actually and reasonably incurred by him in such judicial adjudication, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, advancement of expenses or insurance recovery.

(e) The Company shall be precluded from asserting in any judicial proceeding commenced pursuant to this Section 7 that the procedures and presumptions of this Agreement are not valid, binding and enforceable and shall stipulate in any such court that the Company is bound by all the provisions of this Agreement. The Company shall indemnify Indemnitee against any and all Expenses and, if requested by Indemnitee, shall (within ten (10) days after receipt by the Company of a written request therefore) advance, to the extent not prohibited by law, such expenses to Indemnitee, which are incurred by Indemnitee in connection with any action brought by Indemnitee for indemnification or advance of Expenses from the Company under this Agreement or under any directors' and officers' liability insurance policies maintained by the Company, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, advancement of Expenses or insurance recovery, as the case may be.

(f) Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement to indemnification under this Agreement shall be required to be made prior to the final disposition of the Proceeding.

8. Non-Exclusivity; Survival of Rights; Insurance; Subrogation.

(a) The rights of indemnification as provided by this Agreement shall not be deemed exclusive of any other rights to which Indemnitee may at any time be entitled under applicable law, the articles of incorporation of the Company, the Bylaws, any agreement, a vote of shareholders, a resolution of directors or otherwise. No amendment, alteration or repeal of this Agreement or of any provision hereof shall limit or restrict any right of Indemnitee under this Agreement in respect of any action taken or omitted by such Indemnitee in his Corporate Status prior to such amendment, alteration or repeal. To the extent that a change in the CGCL, whether by statute or judicial decision, permits greater indemnification than would be afforded currently under the Bylaws and this Agreement, it is the intent of the parties hereto that Indemnitee shall enjoy by this Agreement the greater benefits so afforded by such change. No right or remedy herein conferred is intended to be exclusive of any other right or remedy, and every other right and remedy shall be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other right or remedy.

(b) To the extent that the Company maintains an insurance policy or policies providing liability insurance for directors, officers, employees, or agents or fiduciaries of the Company or of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise that such person serves at the request of the Company, Indemnitee shall be covered by such policy or policies in accordance with its or their terms to the maximum extent of the coverage available for any director, officer, employee, agent or fiduciary under such policy or policies. If, at the time of the receipt of a notice of a claim pursuant to the terms hereof, the Company has directors' and officers' liability insurance in effect, the Company shall give prompt notice of the commencement of such proceeding to the insurers in accordance with the procedures set forth in the respective policies. The Company shall thereafter take all necessary or desirable action to cause such insurers to pay, on behalf of the Indemnitee, all amounts payable as a result of such proceeding in accordance with the terms of such policies.

> *[Comment: Some indemnification agreements require the corporation to obtain (or use commercially reasonable or best efforts to obtain) D&O insurance with specified policy limits or other terms. Instead, this Agreement requires the corporation to furnish the indemnitee with the maximum level of D&O insurance coverage provided to other like parties.]*

(c) In the event of any payment under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of Indemnitee, who shall execute all papers required and take all action necessary to secure such rights, including execution of such documents as are necessary to enable the Company to bring suit to enforce such rights.

(d) The Company shall not be liable under this Agreement to make any payment of amounts otherwise indemnifiable hereunder if and to the extent that Indemnitee

has otherwise actually received such payment under any insurance policy, contract, agreement or otherwise.

[Comment: This provision integrates indemnification under the Agreement with indemnification from other sources by providing that payments under the Agreement shall be offset by payments from other sources.]

(e) The Company's obligation to indemnify or advance Expenses hereunder to Indemnitee who is or was serving at the request of the Company as a director, officer, employee or agent of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise shall be reduced by any amount Indemnitee has actually received as indemnification or advancement of expenses from such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise.

9. Exception to Right of Indemnification. Notwithstanding any provision in this Agreement, the Company shall not be obligated under this Agreement to make any indemnity in connection with any claim made against Indemnitee:

(a) for which payment has actually been made to or on behalf of Indemnitee under any insurance policy or other indemnity provision, except with respect to any excess beyond the amount paid under any insurance policy or other indemnity provision; or

(b) for an accounting of profits made from the purchase and sale (or sale and purchase) by Indemnitee of securities of the Company within the meaning of Section 16(b) of the Securities Exchange Act of 1934, as amended, or similar provisions of state statutory law or common law; or

(c) in connection with any Proceeding (or any part of any Proceeding) initiated by Indemnitee, including any Proceeding (or any part of any Proceeding) initiated by Indemnitee against the Company or its directors, officers, employees or other indemnitees, unless (i) the Board of Directors of the Company authorized the Proceeding (or any part of any Proceeding) prior to its initiation or (ii) the Company provides the indemnification, in its sole discretion, pursuant to the powers vested in the Company under applicable law.

[Comment: This provision is designed to prevent the indemnitee from being indemnified for actions brought by the indemnitee except as otherwise provided, as well as for liability under Section 16(b) of the 1934 Act and where payment has already been made under an insurance policy.]

10. Duration of Agreement. All agreements and obligations of the Company contained herein shall continue during the period Indemnitee is an officer or director of the Company (or is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise) *[Comment: Consider extending for several years after term of service, even if claim has not yet been paid]* and shall continue thereafter so long as Indemnitee shall be subject to any Proceeding (or any proceeding commenced under Section 7 hereof) by reason of his Corporate Status, whether or not he is acting or serving in any such capacity at the time any liability or expense is incurred for which indemnification can be provided under this Agreement. [This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective

successors (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business or assets of the Company), assigns, spouses, heirs, executors and personal and legal representatives.]

11. Security. To the extent requested by Indemnitee and approved by the Board of Directors of the Company, the Company may at any time and from time to time provide security to Indemnitee for the Company's obligations hereunder through an irrevocable bank line of credit, funded trust or other collateral. Any such security, once provided to Indemnitee, may not be revoked or released without the prior written consent of the Indemnitee.

12. Enforcement.

(a) The Company expressly confirms and agrees that it has entered into this Agreement and assumes the obligations imposed on it hereby in order to induce Indemnitee to serve as an officer or director of the Company, and the Company acknowledges that Indemnitee is relying upon this Agreement in serving as an officer or director of the Company.

(b) This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral, written and implied, between the parties hereto with respect to the subject matter hereof.

13. Definitions. For purposes of this Agreement:

(a) "**Corporate Status**" describes the status of a person who is or was a director, officer, employee, agent or fiduciary of the Company or of any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise that such person is or was serving at the express written request of the Company.

(b) "**Disinterested Director**" means a director of the Company who is not and was not a party to the Proceeding in respect of which indemnification is sought by Indemnitee.

(c) "**Enterprise**" shall mean the Company and any other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise that Indemnitee is or was serving at the express written request of the Company as a director, officer, employee, agent or fiduciary.

(d) "**Expenses**" shall include all reasonable attorneys' fees, retainers, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, participating, or being or preparing to be a witness in a Proceeding. Expenses also shall include Expenses incurred in connection with any appeal resulting from any Proceeding, including without limitation the premium, security for, and other costs relating to any cost bond, supersedeas bond, or other appeal bond or its equivalent. Expenses, however, shall not include amounts paid in settlement by Indemnitee or the amount of judgments or fines against Indemnitee.

(e) "**Independent Counsel**" means a law firm, or a member of a law firm, that is experienced in matters of corporation law and neither presently is, nor in the past five years has been, retained to represent: (i) the Company or Indemnitee in any matter material to either such party (other than with respect to matters concerning Indemnitee under this Agreement, or of other indemnitees under similar indemnification agreements), or (ii) any other party to the Proceeding giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term "Independent Counsel" shall not include any person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either the Company or Indemnitee in an action to determine Indemnitee's rights under this Agreement. The Company agrees to pay the reasonable fees of the Independent Counsel referred to above and to fully indemnify such counsel against any and all Expenses, claims, liabilities and damages arising out of or relating to this Agreement or its engagement pursuant hereto.

(f) "**Proceeding**" includes any threatened, pending or completed action, suit, arbitration, alternate dispute resolution mechanism, investigation, inquiry, administrative hearing or any other actual, threatened or completed proceeding, whether brought by or in the right of the Company or otherwise and whether civil, criminal, administrative or investigative, in which Indemnitee was, is or will be involved as a party or otherwise, by reason of the fact that Indemnitee is or was an officer or director of the Company, by reason of any action taken by him or of any inaction on his part while acting as an officer or director of the Company, or by reason of the fact that he is or was serving at the request of the Company as a director, officer, employee, agent or fiduciary of another corporation, partnership, joint venture, trust or other Enterprise; in each case whether or not he is acting or serving in any such capacity at the time any liability or expense is incurred for which indemnification can be provided under this Agreement; including one pending on or before the date of this Agreement, but excluding one initiated by an Indemnitee pursuant to Section 7 of this Agreement to enforce his rights under this Agreement.

14. Severability. The invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision. Without limiting the generality of the foregoing, this Agreement is intended to confer upon Indemnitee indemnification rights to the fullest extent permitted by applicable laws. In the event any provision hereof conflicts with any applicable law, such provision shall be deemed modified, consistent with the aforementioned intent, to the extent necessary to resolve such conflict.

[Comment: Since California case law provides no guidance on the permissible extent of excess indemnification under Section 317(g), adopting aggressive excess indemnification provisions, even with the inclusion of a severability clause, potentially risks the enforceability of key indemnification provisions and even the possibility of a judicial declaration that the entire indemnification agreement violates public policy. CEB, Counseling California Corporations, §2.123 at 247.]

15. Modification and Waiver. No supplement, modification, termination or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar) nor shall such waiver constitute a continuing waiver.

16. Notice By Indemnitee. Indemnitee agrees promptly to notify the Company in writing upon being served with or otherwise receiving any summons, citation, subpoena, complaint, indictment, information or other document relating to any Proceeding or matter which may be subject to indemnification covered hereunder. The failure to so notify the Company shall not relieve the Company of any obligation which it may have to Indemnitee under this Agreement or otherwise unless and only to the extent that such failure or delay materially prejudices the Company.

17. Notices. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient, and if not so confirmed, then on the next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be sent:

(a) To Indemnitee at the address set forth below Indemnitee's signature hereto.

(b) To the Company at:

_____
_____
_____
Attention:_____

or to such other address as may have been furnished to Indemnitee by the Company or to the Company by Indemnitee, as the case may be.

18. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may also be executed and delivered by facsimile signature and in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19. Headings. The headings of the paragraphs of this Agreement are inserted for convenience only and shall not be deemed to constitute part of this Agreement or to affect the construction thereof.

20. Governing Law and Consent to Jurisdiction. This Agreement and the legal relations among the parties shall be governed by, and construed and enforced in accordance with, the laws of the State of California, without regard to its conflict of laws rules. The Company and Indemnitee hereby irrevocably and unconditionally (i) agree that any action or proceeding arising out of or in connection with this Agreement shall be brought only in the superior court of the State of California in and for the proper county (as defined in section 177 of the CGCL) (the "**California Court**"), and not in any other state or federal court in the United States of America or any court in any other country, (ii) consent to submit to the exclusive jurisdiction of the California Court for purposes of any action or proceeding arising out of or in

connection with this Agreement, (iii) appoint, to the extent such party is not otherwise subject to service of process in the State of California, irrevocably [name] [address] as its agent in the State of California for acceptance of legal process in connection with any such action or proceeding against such party with the same legal force and validity as if served upon such party personally within the State of California, (iv) waive any objection to the laying of venue of any such action or proceeding in the California Court, and (v) waive, and agree not to plead or to make, any claim that any such action or proceeding brought in the California Court has been brought in an improper or inconvenient forum.

SIGNATURE PAGE TO FOLLOW

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on and as of the day and year first above written.

COMPANY

By:_____
Name:_____
Title:_____

INDEMNITEE

_____
Name: _____

Address:
_____
_____
_____
_____